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Revisiting Indiana's Rule of Evidence 404(b) and the *Lannan* Decision in Light of Federal Rules of Evidence 413-415

ELLEN H. MEILAENDER*

INTRODUCTION

Imagine trying to prosecute a case in which there are no eyewitnesses and no physical evidence indicating that a crime has even occurred, much less connecting the defendant to the crime. Imagine further that the only evidence you have is the testimony of the victim, a sweet, innocent five-year-old little girl with wispy blond curls, a lisp, but also an inability to perfectly recall dates and a nervousness brought on by the courtroom atmosphere. Imagine your frustration when the jury, faced with a credibility contest between this young child and the grown defendant and no other supporting evidence, decides it must acquit. And now, finally, imagine that this same defendant has previously molested another child (or two or three)—information excluded by the rules of evidence, but known by everyone in the courtroom *except* the jury. We are left with a picture of a justice system gone awry, a system that fails to protect five-year-old victims while, in effect, benefitting the defendant who preys in secret on the vulnerable. In cases such as this, we become painfully aware of the high price that can be exacted by the longstanding principle of Anglo-American law that a person should be convicted, not for what he has done in the past, but for what he is found guilty of in this instance.

This Note focuses on the price currently exacted in sex offense cases in Indiana. The law in Indiana regarding evidence of past sexual misconduct explicitly (and intentionally) follows the Federal Rule of Evidence 404(b),¹ unless offered to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, such evidence is inadmissible.² It cannot be offered to show a propensity to commit crime or a bad character.

This was not always the case. Prior to a 1992 case, *Lannan v. State*,³ Indiana courts recognized a “depraved sexual instinct” exception to the general rule. This exception was in accord with the law in many other states.⁴ Moreover, not long after Indiana

* J.D. Candidate, 2000, Indiana University School of Law—Bloomington; B.A., 1997, Wittenberg University. I would like to thank Brian Gensel, Chief Deputy Prosecutor, Porter County Prosecutor's Office, for first calling my attention to this issue. Special thanks to my family for their love and encouragement, and especially to my parents, who have taught me more than I care to admit and to whom I will forever remain indebted.

1. FED. R. EVID. 404(b), which reads in part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

2. See *Lannan v. State*, 600 N.E.2d 1334, 1339 (Ind. 1992) (“[W]e hereby adopt [Federal Rule of Evidence 404(b)] in its entirety, effective from this day forward.”).

3. *Id.*

4. See Thomas J. Reed, *Reading Goal Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 189 & n.340 (1993).

had reformed its law to be in accord with the federal law, three new federal rules of evidence went into effect that, in essence, created an exception to the strictures of Rule 404(b) in sexual assault and child molestation cases much like the exception Indiana abandoned in 1992.⁵ In other words, Indiana, believing the federal rule to be the better, switched to conform with federal law. The federal government, believing, in effect, that it was Indiana that had the better rule, reformed its own law, leaving Indiana once again at odds with the Federal Rules of Evidence. Indiana's current law on this issue is thus no longer in accord with the Federal Rules of Evidence, the laws of many other states, or much of our own history of treating sex offense cases differently. This Note is a call for the Indiana Supreme Court to rethink its decision in *Lannan* in light of the changes in the federal rules and to adopt at least some version of those rules.

Part I of this Note will provide a historical overview of how the law in this area developed, starting with the prevailing general rule against propensity evidence in the Anglo-American justice system and then looking at how that rule has historically been applied to sex offense cases. Next, it will elaborate on how Indiana in particular has handled this issue, describing the shift away from the "depraved sexual instinct" exception, which allowed propensity evidence to be introduced, to the adoption of Federal Rule of Evidence 404(b), which does not, and the unsuccessful legislative attempt to shift back. Finally, it will discuss the structure and legislative history of the enactment of the new Federal Rules of Evidence 413-415.

Part II will analyze the wisdom and effectiveness of granting an exception in sex offense cases to the general rule prohibiting character evidence. Although this Part focuses on the respective arguments made by proponents and critics of the new federal rules, much of the same analysis would apply to any common law exception. Specifically, I will address the continuing validity (or lack thereof) of the general rule against character evidence, the debate over sex offender recidivism rates, and the unique nature of sex offenses.

Finally, Part III will apply this analysis to the Indiana Supreme Court's *Lannan* opinion, questioning whether its reasoning remains sound, if indeed it ever was. In light of the increasing dubiousness of the social science research on which the old rules of evidence are premised and the reform achieved in the federal rules, the Note concludes that Indiana should once again reform its law and allow evidence of prior misconduct in sex offense cases.

I. A HISTORICAL OVERVIEW OF THE LAW CONCERNING PRIOR MISCONDUCT EVIDENCE

A. The General Rule Against Prior Misconduct Evidence

American courts, borrowing from their English common law heritage, have a long history of prohibiting evidence of prior misconduct on the part of the defendant if it is introduced to prove guilt, bad character, or a propensity to commit crime.⁶ In fact,

5. See FED. R. EVID. 413-415.

6. See Reed, *supra* note 4, at 156 & n.165, 164-65; Jeffrey G. Pickett, Comment, *The*

every single state has adopted this principle either by statute or in its common law.⁷ Several reasons have been given for this longstanding prohibition. The relevancy or probative value of this type of evidence was, as a general rule, thought to be rather low.⁸ More important, however, was the risk of prejudice it created despite being of arguably little probative value. The jury might be more willing to convict after hearing about a defendant's tarnished past; the jury might, in effect, punish the defendant for being a bad person rather than for what he was alleged to have done.⁹ The jury might also feel less compunction about entering a wrong verdict, rationalizing that even if the defendant is innocent of this charge, he had gone unpunished earlier so that it all evens out in the end—a result at odds with a presumption of innocence. Finally, by prohibiting evidence of prior misconduct, this rule also limits the scope of the trial and protects against jury confusion.

This is not to say that courts never admitted this type of evidence. There is almost as long a history of exceptions to the general rule as there is of the general rule itself.¹⁰ When the evidence was offered not to show propensity but for some other purpose, such as motive, intent, identity, or opportunity, it was admissible. These exceptions were finally gathered together and given a definitive statement in a turn-of-the-century New York case, *People v. Molineux*.¹¹ The *Molineux* rule, as these exceptions came to be called, was eventually codified in the Federal Rule of Evidence 404(b).¹²

It would be premature to end the discussion of the historical exclusion of propensity evidence here, however, as many commentators have.¹³ For upon closer examination, it becomes clear that this prohibition has never applied with equal weight to sex offense cases as it has to all other crimes. Historically, English common law did not allow for admission of evidence of past misconduct in sex offense cases. However, this was in part a product of the fact that many of these offenses were left to the jurisdiction of the ecclesiastical law and courts rather than to the secular courts.¹⁴ As a matter of ecclesiastical law, many of these crimes required corroboration and made it in fact necessary to show a history of past misconduct.¹⁵

Presumption of Innocence Imperiled: The New Federal Rules of Evidence 413-415 and the Use of Other Sexual-Offense Evidence in Washington, 70 WASH. L. REV. 883, 885 (1995).

7. See Sara Sun Beale, Conference Paper, *Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse*, 4 CRIM. L.F. 307, 308 (1993); Pickett, *supra* note 6, at 886.

8. See Pickett, *supra* note 6, at 886.

9. See David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 565 (1994); Jason L. McCandless, Note, *Prior Bad Acts and Two Bad Rules: The Fundamental Unfairness of Federal Rules of Evidence 413 and 414*, 5 WM. & MARY BILL RTS. J. 689, 696 (1997); Pickett, *supra* note 6, at 887.

10. See Anne Elsberry Kyl, Note, *The Propriety of Propensity: The Effects and Operation of New Federal Rules of Evidence 413 and 414*, 37 ARIZ. L. REV. 659, 664 (1995).

11. 61 N.E. 286 (N.Y. 1901).

12. See Reed, *supra* note 4, at 174; Lisa M. Segal, Note, *The Admissibility of Uncharged Misconduct Evidence in Sex Offense Cases: New Federal Rules of Evidence Codify the Lustful Disposition Exception*, 29 SUFFOLK U. L. REV. 515, 520 (1995).

13. See, e.g., McCandless, *supra* note 9, at 702-05.

14. See Reed, *supra* note 4, at 163-66.

15. See *id.* at 166.

When this ecclesiastical law combined with the common law in the American colonies, then, it brought with it this precedent for allowing evidence of prior misconduct to prove the offense.¹⁶

Originally, this exception was restricted to adultery and incest cases.¹⁷ By the mid-nineteenth century, however, this type of evidence was being admitted in prosecutions of other sexual crimes as well, including rape.¹⁸ The courts had also developed a "lustful disposition" rule, a special exception to the general character evidence rule that applied only to sex offenders.¹⁹ Under this rule, evidence of past misconduct was admitted to show that the defendant had a propensity to engage in aberrant sexual behavior. By the middle of the twentieth century, a majority of states followed some version of the lustful disposition rule.²⁰ In addition, many other states broadly interpreted the enumerated *Molineux* exceptions when it came to sex offense cases. In these states, evidence of past conduct was admitted under the guise of "intent" or "plan," even though under the normal understanding of those exceptions such evidence should not have been allowed.²¹ Beginning in the 1960s, commentators began to criticize the lustful disposition rule and a number of states reformed their laws, especially following the codification of the Federal Rules of Evidence, which contained no such exception.²² Despite this trend, a sizeable number of states have continued their special treatment of sex offense cases to this day.

In terms of historical practice and tradition, it is overwhelmingly clear that sex offense cases have not been treated on a par with other crimes in regards to the admission of past misconduct evidence.²³ Although states have differed on the means by which this evidence is admitted and the degree to which an exception is allowed, the vast majority have felt that sex offense cases, due to their nature, should be treated

16. *See id.*

17. *See id.* at 166-67; *see also* Segal, *supra* note 12, at 525.

18. *See* Reed, *supra* note 4, at 168-82.

19. *See id.* at 168; Segal, *supra* note 12, at 526.

20. *See* Reed, *supra* note 4, at 218; *cf.* Chris Hutton, *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. L. REV. 604, 614 (1989); Segal, *supra* note 12, at 526-28. The following states still recognized the lustful disposition exception as of 1993: Alaska, Arizona, Arkansas, California, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, Nebraska, New Mexico, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *See* Reed, *supra* note 4, at 189 n.340. Delaware, Indiana, and New York also recognized this exception for many years. *See id.* at 189 n.339.

21. *See* Bryden & Park, *supra* note 9, at 543 (stating, for example, that "[s]ometimes . . . courts have given the motive concept astonishing breadth in child sex abuse cases"); David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 31 (1994) (providing examples of the "strong tendency to apply the standard exception categories with unusual liberality" in sex offense cases); Reed, *supra* note 4, at 200 ("The courts generally grant the prosecution great leeway to introduce uncharged sexual misconduct [evidence] when the intermediate issue, enumerated under Rule 404(b) or its common-law predecessor, is not truly an issue in the case.").

22. *See* Beale, *supra* note 7, at 312.

23. *See* Kyl, *supra* note 10, at 665 ("Historically there have been additional exceptions made in the case of child molestation and sexual assault."); Pickett, *supra* note 6, at 888-90.

differently.²⁴

Not only are these crimes especially heinous, but they also occur in private where there are no eyewitnesses, often leave little or no physical evidence, and often leave their victims too traumatized to report the crime.²⁵ Whether accomplished by creating a special "lustful disposition" exception (broadly or narrowly construed) or by massaging the Rule 404(b) exceptions, courts have recognized a need to change the rules of the game somewhat when sex crimes are involved.

*B. The Depraved Sexual Instinct
Exception in Indiana*

Indiana was one of many states that created a common law lustful disposition rule, although in Indiana it was termed the depraved sexual instinct exception.²⁶ This exception was rather broad; virtually no limits were placed on the evidence that could be introduced to show a propensity or compulsion for sexual deviance. Sexual misconduct could be remote in time, committed on a different victim, and be of a different type than the charged sexual misconduct and yet be admitted.²⁷

It was this "open-ended application" of the depraved sexual instinct exception that led the Indiana Supreme Court in *Lannan v. State* to abandon it in favor of the Federal Rule 404(b).²⁸ The defendant in *Lannan* was charged and convicted on one count of child molestation for having engaged in sexual intercourse with a fourteen-year-old girl.²⁹ The trial court had admitted evidence that the defendant had fondled a cousin of the victim on the same evening, that he had fondled both girls on a previous occasion, and that he had performed sexual intercourse on the victim on at

24. See Pickett, *supra* note 6, at 888-90; see also Beale, *supra* note 7, at 309-12.

25. See 140 CONG. REC. 15,209-10 (1994) (statement of Rep. Kyl); Beale, *supra* note 7, at 317; Karp, *supra* note 21, at 20-21; John E.B. Myers, *Uncharged Misconduct Evidence in Child Abuse Litigation*, 1988 UTAH L. REV. 479, 479-80.

26. See *Lannan v. State*, 600 N.E.2d 1334, 1335 (Ind. 1992) (discussing the "long settled" depraved sexual instinct exception in Indiana); see also *Crabtree v. State*, 547 N.E.2d 286, 288-89 (Ind. Ct. App. 1989) (discussing many of the ways in which the depraved sexual instinct exception had been used in Indiana); Reed, *supra* note 4, at 135-36.

27. See, e.g., *Baughman v. State*, 528 N.E.2d 78, 80 (Ind. 1988) (admitting evidence that the defendant had molested his stepdaughter as a child in a trial on charges of molestation of the stepgranddaughter); *Lawrence v. State*, 464 N.E.2d 923, 924 (Ind. 1984) (admitting evidence in a child molestation case of the defendant's rape conviction 22 years earlier); *Crabtree*, 547 N.E.2d at 289 (admitting evidence that the defendant had molested another stepdaughter 22 to 30 years earlier); *Dockery v. State*, 504 N.E.2d 291, 295-96 (Ind. Ct. App. 1987) (admitting evidence of previous molestation by the defendant that had occurred 17 to 30 years earlier).

28. *Lannan*, 600 N.E.2d at 1338 ("Yet it seems to us that any justification for maintaining the exception in its current form is outweighed by the mischief created by the open-ended application of the rule.").

29. *Id.* at 1340.

least three occasions subsequent to the charged event.³⁰ The defendant appealed his conviction, asking the court to abandon the "depraved sexual instinct" exception under which that evidence had been admitted.³¹

The supreme court began its opinion with a discussion of what it saw as the two rationales for the exception: the "recidivist rationale" and the "bolstering rationale."³² The former is based on a belief that sex offenders are more likely to re-offend than other criminals, thus lending probative value to a history of past sexual misconduct.³³ Although the court accepted the premise that recidivism among sex offenders is quite high, it was unwilling to accept this as a sufficient justification for treating sex crimes differently because there was no similar exception for other offenders who are also highly recidivistic.³⁴ The bolstering rationale argues that this evidence lends necessary credibility to the victim's account of acts that are otherwise hard to believe possible.³⁵ The court found that this rationale was no longer persuasive in a world in which people are not so quick to discount an accusation of rape or sexual abuse as impossible.³⁶ Finally, the court noted that under this exception, the defendant did not have to be notified of the prosecution's intent to present this evidence and that the exception often was used to admit evidence only tenuously connected to the charged act.³⁷ The court therefore abandoned the depraved sexual instinct exception and adopted the Federal Rule of Evidence 404(b) in its entirety.³⁸

The Indiana legislature, apparently disagreeing with the court's balancing of interests in *Lannan*, responded by passing a statute that allowed the introduction of similar prior sexual misconduct evidence in cases of child molestation or incest.³⁹ This statute, however, was held to be a nullity because it conflicted with the common law rules of evidence.⁴⁰ This issue has thus been removed from the legislative sphere; only the Indiana Supreme Court can undo what it has done.⁴¹ Despite the legislature's efforts, the law in Indiana today remains as it was laid out in *Lannan*.

30. See *id.* at 1340-41.

31. See *id.* at 1335.

32. *Id.*

33. See *id.* at 1336.

34. See *id.* at 1336-37 (noting the "extraordinarily high" recidivism rate of drug offenders).

35. See *id.* at 1337.

36. See *id.*

37. See *id.* at 1338.

38. See *id.* at 1339.

39. See IND. CODE § 35-37-4-15 (1994).

40. See *Day v. State*, 643 N.E.2d 1, 2-3 (Ind. Ct. App. 1994) ("We also observe that we have previously declared that this statute is a nullity since it conflicts with the common law rules of evidence."); see also *Brim v. State*, 624 N.E.2d 27, 33 & n.2 (Ind. Ct. App. 1993) (mentioning in dicta that this statute is a nullity because it conflicts with a "common law rule of evidence established by the Indiana Supreme Court").

41. Cf. *Kyl*, *supra* note 10, at 675 (commenting that the new Federal Rules 413 and 414 are more likely to be adopted in states in which the legislature, rather than the judiciary, enacts evidentiary rules).

C. The Federal Rules of Evidence 413-415

Just two years after Indiana had changed its law to follow what it regarded as the better federal law, that federal law fundamentally changed. As a part of the Violent Crime Control and Law Enforcement Act of 1994,⁴² the United States Congress enacted into law three new rules of evidence which went into effect on July 9, 1995.⁴³ Rule 413 applies to sexual assault cases and makes evidence of other sexual assaults by the defendant admissible "on any matter to which it is relevant."⁴⁴ As the legislative history makes clear, that includes showing a propensity toward aberrant sexual behavior: "For example, it could be considered as evidence that the defendant has the motivation or disposition to commit sexual assaults, and a lack of effective inhibitions against acting on such impulses"⁴⁵ Rule 414 applies to child molestation cases, making evidence that the defendant has committed child molestation offenses admissible, again for any matter on which it is relevant.⁴⁶ Rule 415 creates a similar exception for civil cases alleging sexual assault or child molestation.⁴⁷ All three rules require that the defendant be notified at least fifteen days in advance of the evidence the prosecution intends to offer and that the specifics of that evidence be fully disclosed to the defendant.⁴⁸

These rules had initially been proposed by Representative Susan Molinari and Senator Bob Dole in 1991⁴⁹ and were included in President Bush's proposed Comprehensive Violent Crime Control Act of 1991.⁵⁰ The legislative sponsors were concerned by the "considerable uncertainty and inconsistency" that marked the approach of the courts in regards to admitting this type of evidence.⁵¹ This was especially true in states where admission relied on convincing a judge to stretch the Rule 404(b) exceptions. They also believed that successful prosecution of sex crimes was both extremely important and extremely difficult, given the nature of the offenses.⁵² Sex crimes are among the most traumatic and invasive of all serious

42. Pub. L. No. 103-322, 108 Stat. 2137 (1994).

43. See FED. R. EVID. 413-415. Because these rules are most controversial in the criminal context and because my own personal interest in this issue happens to be strongest in that context, this Note will focus on Rules 413 and 414, although much of what is said about these rules also could be said about Rule 415.

44. FED. R. EVID. 413.

45. H.R. DOC. NO. 102-58, at 258 (1991); see also 140 CONG. REC. 23602-03 (1994) (statement of Rep. Molinari) (explaining that evidence could be admitted to show the "defendant's propensity to commit" sex offenses).

46. FED. R. EVID. 414.

47. FED. R. EVID. 415.

48. See, e.g., FED. R. EVID. 413(b) (stating that the prosecution "shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days" in advance).

49. See 140 CONG. REC. 24799 (1994) (statement of Sen. Dole); 140 CONG. REC. 23602-03 (1994) (statement of Rep. Molinari).

50. See H.R. DOC. NO. 102-58, at 138-41, 256-70 (1991).

51. *Id.* at 257.

52. See Karp, *supra* note 21, at 20-21. For a similar argument, see Beale, *supra* note 7, at 317.

The injury resulting from sex offenses is more serious than that associated with

crimes.

Such cases regularly present the need to rely on the testimony of child-victim witnesses whose credibility can readily be attacked in the absence of substantial corroboration. In such cases, the public interest in admitting all significant evidence that will illumine the credibility of the charge and any denial by the defense is truly compelling.⁵³

The sponsors also believed that the rules contained sufficient protections for defendants.⁵⁴ The rules explicitly require the prosecutor to give the defendant fifteen days advance notice and to disclose his evidence to the defendant, thus alleviating a potential due process concern. Although they supersede Rule 404(b), the rules remain subject to the Rule 403 balancing test; judges retain the discretion to prohibit this evidence if its prejudicial effect would substantially outweigh its probative value.⁵⁵ Finally, the rules also restrict admission to only "serious criminal acts which are of the same type" as the one charged,⁵⁶ and they explicitly define what would constitute the "same type" of crime.⁵⁷ This prevents the trial from turning into an open-ended

most other offenses, and there is a correspondingly greater need to prosecute offenders successfully. Few people would dispute that the sexual abuse of a child works a more profound and lasting harm than a theft and that society has a greater responsibility to identify and punish sex offenders than thieves.

Id.

53. H.R. DOC. NO. 102-58, at 257 (1991).

54. *See* 140 CONG. REC. 7817 (1994) (statement of Rep. Molinari) (explaining that the new rules would remain subject to Rule 403 as well as all of the other normal protections for defendants); *see also* Karp, *supra* note 21, at 19 (stating that the "general standards of the rules of evidence" would still apply, including the "limitations of hearsay evidence" and "the court's authority to exclude relevant evidence under . . . Rule 403").

55. *See* 140 CONG. REC. 24,799 (1994) (statement of Sen. Dole); 140 CONG. REC. 23602-03 (1994) (statement of Rep. Molinari); *see also* Karp, *supra* note 21, at 19 ("[E]vidence admissible pursuant to these rules would remain subject to the normal authority of the court to exclude evidence pursuant to F.R.E. 403 . . ."). Despite this clear evidence in the legislative history that the drafters of the new rules intended them to remain subject to Rule 403, this remained a source of controversy even after the rules went into effect. The rules state that this evidence "is admissible," and they make no reference to any possible application of Rule 403, thus raising doubts as to whether or not these rules fell outside of Rule 403. *See* McCandless, *supra* note 9, at 710, 715; Pickett, *supra* note 6, at 893-95. Federal courts have consistently construed the rules to remain subject to Rule 403, however, thus resolving the issue. *See, e.g.,* United States v. Guardia, 135 F.3d 1326, 1329-30 (10th Cir. 1998) (concluding that the balancing test of Rule 403 applies to Rule 414 evidence); United States v. Enjady, 134 F.3d 1427, 1431 (10th Cir. 1998) (holding that evidence submitted pursuant to Rule 413 is subject to the Rule 403 balancing test); United States v. Sumner, 119 F.3d 658, 661-62 (8th Cir. 1997) (concluding that the Rule 403 balancing test applies to evidence submitted under Rule 414); United States v. Larson, 112 F.3d 600, 604-05 (2d Cir. 1997) (concluding that the Rule 403 balancing applies to evidence submitted under Rule 414); *see also* Kyl, *supra* note 10, at 671-72.

56. H.R. DOC. NO. 102-58, at 262 (1991); *see also* Kyl, *supra* note 10, at 699-70 (discussing the limiting effect of the "same type" of crime requirement in Rules 413-414).

57. *See, e.g.,* FED. R. EVID. 413(d) (providing a definition of what "offense of sexual

inquiry into every bad act the defendant ever committed. Moreover, it ensures that the evidence will be highly probative because it shows that the defendant has committed this exact type of crime before.⁵⁸ Such evidence reveals that "[t]he defendant has the unusual combination of aggressive and sexual impulses that motivates the commission of such crimes" and lacks "effective inhibitions" against committing such a crime.⁵⁹ In addition, applying the "doctrine of chances," it shows the improbability that the charge is false.⁶⁰ It is exceedingly unlikely that a person who has shown himself to be a sex offender would then be hit by a false charge of committing the same type of crime.⁶¹

In the end, all of these arguments proved persuasive; the Senate passed the amendment by a vote of 75-19,⁶² the House passed it by a vote of 348-62,⁶³ and the legislation was subsequently enacted. Since they went into effect, the constitutionality of Rules 413 and 414 has been challenged several times on due process and equal protection grounds, but the rules have been upheld by several different courts.⁶⁴

II. AN ANALYSIS OF THE WISDOM OF CREATING AN EXCEPTION FOR SEX OFFENSES

A. The Relevance of Past Conduct in Predicting Future Conduct

The wisdom of the general rule against character evidence depends in part on whether or not a person's past actions can serve as an accurate predictor of how he will act in the future. After all, as was discussed earlier, one of the major rationales or justifications of this rule is that this type of evidence has little or no probative value;⁶⁵ knowing how a person acted ten years ago simply does not tell us anything reliable about how he acted today.⁶⁶ Should this rationale turn out to be incorrect, our

assault" means for purposes of this rule).

58. See Larry E. Beutler et al., *Evaluation of "Fixed Propensity" To Commit Sexual Offenses*, 22 CRIM. JUST. & BEHAV. 284, 293-94 (1995); Karp, *supra* note 21, at 22.

59. H.R. DOC. NO. 102-58, at 263 (1991).

60. See *id.* at 262-64; see also Karp, *supra* note 21, at 20.

61. Several commentators have criticized this argument, pointing out that the same argument would apply to all serious crimes, not just sex offenses. See, e.g., Bryden & Park, *supra* note 9, at 574; McCandless, *supra* note 9, at 692. It should be noted, however, that this counterargument does not necessarily cut against admission as a logical matter; it might mean that we should be admitting this kind of evidence in all cases. It also ignores the fact that there is a greater need for this evidence in sex offense cases than there is in other types of cases. See *infra* text accompanying notes 105-09.

62. See 139 CONG. REC. 27,635 (1993).

63. See 140 CONG. REC. 15,211-12 (1994).

64. For example, the Tenth Circuit has issued several opinions addressing these issues. See, e.g., *United States v. Castillo*, 140 F.3d 874 (10th Cir. 1998) (holding that Rule 414 violates neither the Due Process Clause, the Equal Protection Clause, nor the Eighth Amendment); *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998) (rejecting an argument that Rule 413 was facially unconstitutional as a violation of the Due Process Clause).

65. See *supra* text accompanying notes 8-9.

66. Not all scholars have defended the rule on this ground. Wigmore wrote that the

prohibition on character evidence becomes less persuasive in general and especially unpersuasive in sex offense cases, where our need for this evidence, as discussed below,⁶⁷ is so great.

The psychological community has been divided over the answer to this question. During the 1950s and 1960s, psychologists ascribed to the "trait theory" of personality, which holds that behavior is governed by stable character traits that cause a person to act consistently over time.⁶⁸ By the early 1970s, however, this theory had been abandoned and replaced by "situational theory," which holds that behavior is situation-specific and governed by environmental factors.⁶⁹ It is the premise of this theory that is adhered to by the federal rule's general prohibition against character evidence. But by the 1980s, situationism had been discredited in the minds of many psychologists, and trait theory, using an improved methodology, was once again seen as the more accurate predictor of behavior.⁷⁰ "[M]ost psychologists now recognize that, as a general matter, a lay person, given information about a subject's past behavior, can predict the subject's future behavior with a significant degree of accuracy."⁷¹ This revision of psychiatric opinion calls into question our across-the-board distrust of character or propensity evidence and leaves open the possibility that some of this evidence is highly relevant and should be admissible. "[T]he view that character evidence in general is not probative of conduct can no longer draw support from the psychology materials."⁷²

Furthermore, as the similarity of the prior conduct to the current conduct, and of the circumstances in which both occurred, increases, so does the predictive value of the prior conduct.⁷³ The limitations in Federal Rules 413 and 414 acknowledge this, ensuring that only the most relevant and most probative prior misconduct evidence is admitted.⁷⁴ The rules explicitly require that there be a high degree of similarity in

problem with this evidence was not that it had too little probative value, but that the jury would give it too much weight. 1A JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 58.2, at 1212-13 (Tillers rev. ed. 1983). Thus, for policy reasons, we might wish to exclude this evidence even while admitting its relevancy. Once we have moved into questions of policy, however, the analysis becomes much more open-ended because we can now consider questions of opposing policies, calling for admission in some circumstances that we could not let ourselves consider when this evidence was held to be unreliable. In other words, if this evidence is relevant, the case for admitting it in sex offense cases becomes much stronger even if we still exclude it in other cases.

67. See *infra* text accompanying notes 105-09.

68. See Susan Marlene Davies, *Evidence of Character To Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 513 (1991).

69. See *id.* at 514-15.

70. See *id.* at 515-16.

71. *Id.* at 517.

72. *Id.* at 533.

73. See Beutler et al., *supra* note 58, at 293 (stating that "[t]he current findings support the hypothesis that sexual offenses committed by the same offender are much more similar than those committed by different offenders," and that "the present results suggest that it may be possible to determine empirically, on the basis of the extent of similarity between offenses, the probability that particular offenses were committed by the same offender"); Karp, *supra* note 21, at 22.

74. See *supra* text accompanying notes 56-58.

kind between the charged offense and the prior misconduct. In a sexual assault case, only evidence of other sexual assaults, as defined by the statute, is admissible; in a child molestation case, only evidence of other occurrences of molestation, again as defined by the statute, is admissible.⁷⁵ This is a far cry from the kind of open-ended inquiry into every bad act ever committed by the defendant that some feared the rules would create.

Moreover, it is also much narrower than was the "depraved sexual instinct" exception as it was applied in Indiana and still is applied elsewhere.⁷⁶ Under the old Indiana law, evidence of a prior rape or of exhibitionism could be admitted in a child molestation case.⁷⁷ In fact, it appeared to be, at least in part, this far-reaching, less reliable use of the depraved sexual instinct rule that drove the court to abandon the exception in *Lannan*.⁷⁸ It appeared virtually limitless. The federal rules, on the other hand, are much narrower in scope; therefore, the evidence admitted under them is much more probative.

B. The Justification for an Exception in Sex Offense Cases

There remains the question of why sex offense cases should be treated differently, why character evidence should be admitted here when it is not elsewhere. Of course, there is always the argument that half a loaf is better than none, but a more persuasive argument can be made. This argument is twofold. First, there is reason to believe that this kind of evidence is especially relevant and reliable in sex offense cases.⁷⁹ Evidence of this is found in the growing realization that recidivism rates for these offenses were for many years vastly underestimated and are actually much higher than thought. Second, the very nature of these crimes creates a special need for this evidence.⁸⁰ These are crimes for which there are seldom witnesses or physical evidence—crimes, in short, which are singularly hard to prove beyond a reasonable doubt yet occur far too often.

1. Reconsidering the Recidivism Rates of Sexual Offenders

Implicit in Rules 413-415 is the belief that character evidence is more reliable in sex offense cases than it is for other offenses.⁸¹ This belief in turn is based on a belief that the impulses that lead a person to commit these acts are not normal but are

75. See *supra* text accompanying notes 56-58.

76. See *supra* text accompanying notes 26-28.

77. See, for example, *Lawrence v. State*, 464 N.E.2d 923 (Ind. 1984), in which a prior rape conviction was admitted in a trial for child molestation 22 years later.

78. *Lannan v. State*, 600 N.E.2d 1334, 1338 (Ind. 1992) ("[A]ny justification for maintaining the exception in its current form is outweighed by the mischief created by the open-ended application of the rule.").

79. See *infra* text accompanying notes 81-104.

80. See *infra* text accompanying notes 105-09.

81. See McCandless, *supra* note 9, at 691.

perverted, deviant, and immutable, or at least highly recidivistic, in nature.⁸² Thus, sex offenders have an abnormal sexual predisposition that frequently lends itself to recurrent conduct. This is especially true in child molestation cases; these defendants have a type of desire or impulse—"a sexual or sado-sexual interest in children—that simply does not exist in ordinary people."⁸³ Most people understand the normal human emotions and desires that might drive one to commit a robbery or a battery, and they can even see those emotions and desires in themselves and all those around them, although tempered by self-control and lawfulness. Most people, however, cannot understand the desires that lead to sex crimes for, in this perverted form, these desires are not normal. These abnormal desires, then, are found only in a limited segment of the population, thereby narrowing the pool of possible perpetrators rather significantly.

These desires also tend to be manifested in repetitive conduct. Social science research identifies two main categories of child molesters: fixated and regressed.⁸⁴ Fixated molesters, more commonly known as pedophiles, are persons whose primary sexual attraction is to children.⁸⁵ In fact, the clinical definition of pedophilia says that its essential feature is "recurrent, intense, sexual urges and sexually arousing fantasies, of at least six months' [sic] duration, involving sexual activity with a prepubescent child."⁸⁶ Thus, pedophilia is by definition a propensity for certain conduct; therefore, prior acts of misconduct that tend to show that the defendant is a pedophile—in other words, propensity evidence—are highly relevant to an allegation of child sexual molestation.⁸⁷ Regressed molesters develop a sexual attraction to children largely because of the power these relationships provide them; often this occurs as a result of stress and dysfunction in the molester's adult sexual relationships.⁸⁸ Many therapists believe that these molesters are "not curable, but treatable," though the treatment necessary may vary from learning coping mechanisms to drug therapy to reduce the sex drive to surgical castration.⁸⁹

Along with the "not curable, but treatable" view comes the belief that "a single incident of child sexual abuse is rare, and [therefore] that recidivism is prevalent."⁹⁰ This is quite different from what was for many years the prevailing view—namely, that sex offenders are much less recidivistic than other serious offenders.⁹¹ Many

82. See Hutton, *supra* note 20, at 614; Pickett, *supra* note 6, at 899.

83. 140 CONG. REC. 23,603 (1994) (statement of Rep. Molinari).

84. See Hutton, *supra* note 20, at 620.

85. See *id.*

86. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM III-R) 284 (3d ed. rev. 1987) [hereinafter DSM III-R] (emphasis added).

87. See Beale, *supra* note 7, at 320.

88. See Hutton, *supra* note 20, at 621.

89. *Id.* at 622 (quoting Nicholas Groth, *The Incest Offender*, in HANDBOOK OF CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE 215, 225 (S. Sgroi ed. 1982)).

90. *Id.*

91. See A. Nicholas Groth et al., *Undetected Recidivism Among Rapists and Child Molesters*, 28 CRIME & DELINQ. 450, 450-51 (1982) (citing many studies reporting that sex offenders were not typically recidivistic); Joseph J. Romero & Linda Meyer Williams, *Recidivism Among Convicted Sex Offenders: A 10-Year Followup Study*, 49 FED. PROBATION 58, 58 (1985) (reporting that previous research generally did not portray the sex offender as

studies concluded that sex offenders are generally first-time offenders who are extremely unlikely to re-offend; in fact, one study cited found that only seven percent of the serious sex offenders were rearrested for another sex crime.⁹² These crimes were believed to be situation-driven rather than a result of a predisposition of the defendant. These studies were frequently cited by opponents of Rules 413-415 as evidence that the distinction drawn by these rules between sex offenses and other offenses is unwarranted and leads to the admission of unreliable evidence.⁹³

These findings, however, did not coincide with the clinical experience of many experts and therapists in the field; their daily work indicated a much higher rate of recidivism.⁹⁴ As their understanding of sexual offenses grew, social scientists began to question the methodology of those studies on two main grounds. First, the studies frequently calculated recidivism on the basis of arrest or reconviction rates.⁹⁵ Due to the small number of offenses reported and even smaller numbers of those arrested and reconvicted, these measurements are "woefully inadequate" and "serious[ly] underestimate" the true extent of recidivism.⁹⁶ Many victims are too traumatized or humiliated to report; others have been threatened or intimidated.⁹⁷ Second, these studies were generally short-term follow-ups; they often defined recidivism as another conviction (or rearrest) within two or three years of the prior conviction.⁹⁸ Given the problems of detection and prosecution of sex offenses, however, this short

a serious recidivist).

92. See Groth et al., *supra* note 91, at 450 (citing a study by the New Jersey Commission on the Habitual Sex Offender).

93. See, e.g., Bryden & Park, *supra* note 9, at 572 ("The available data on recidivism do not support a unique rule for sex crimes."); McCandless, *supra* note 9, at 691 ("The data about recidivism, however, does not support the distinction between sex offenses and other serious offenses."); Pickett, *supra* note 6, at 900 ("Moreover, studies indicate that sexual offenders exhibit either a low rate of recidivism or, at the very least, no greater a likelihood of reoffense than other types of criminals.").

94. See, e.g., Groth et al., *supra* note 91, at 451; see also R. Karl Hanson et al., *A Comparison of Child Molesters and Nonsexual Criminals: Risk Predictors and Long-Term Recidivism*, 32 J. RES. CRIME & DELINQ. 325, 334 (1995) (discussing the results of a study that compared recidivism rates of child molesters with those of nonsexual criminals. The study indicated that 97% of all of the sexual offense recidivism was committed by the child molesters whereas 96% of the nonsexual violent recidivism was committed by the nonsexual criminals).

95. See Groth et al., *supra* note 91, at 457; see also Romero & Williams, *supra* note 91, at 58.

96. Hutton, *supra* note 20, at 622; see also Romero & Williams, *supra* note 91, at 58 (stating that reliance on conviction rates "provides a serious underestimate" of sex offender recidivism).

97. See 140 CONG. REC. 15,209 (1994) (statement of Rep. Kyl); Karp, *supra* note 21, at 25.

98. See Groth et al., *supra* note 91, at 457; Romero & Williams, *supra* note 91, at 58; see also DAVID FINKELHOR, A SOURCEBOOK ON CHILD SEXUAL ABUSE 133-34 (1986) (reporting that a common problem with studies of recidivism rates is the relatively short span over which recidivism data is collected and that follow-up periods of less than five years risk significantly underestimating the true rates of recidivism); Lita Furby et al., *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3, 8 (1989) (discussing the "empirical finding that the longer the follow-up period, the larger the percentage of offenders who are known to have relapsed").

a period of follow-up will fail to uncover most of the recidivists and thus greatly underestimate the problem.

In response, later research attempted to uncover undetected recidivism by utilizing self-reporting rates or by significantly extending the length of the study.⁹⁹ This research supports the conclusion that, "contrary to the impression yielded by the general literature, [sex] offenders are serious recidivists," although much of their recidivism goes undetected.¹⁰⁰ In one study, the sex offenders involved committed, on average, two to five times as many undetected offenses as detected offenses.¹⁰¹ These studies provide very persuasive evidence not just that sex offenders recidivate at least as often as other offenders, but that they in fact recidivate at much higher rates.

Moreover, most of these researchers believe that their results are still a significant *underestimate* of actual recidivism.¹⁰² So long as arrest rates are used, the problems of underreporting will continue to cause much recidivism to go undetected. Even when rates are based on self-reporting, they still provide at best a conservative estimate. Sex offenders characteristically misperceive their own behavior, minimize their own wrongdoing, and misinterpret the behavior of their victims, all of which leads them to a very different conclusion as to what constitutes one of these offenses than a normal, objective observer would conclude.¹⁰³ In addition, "[t]here is no status recognition or reward for being a sexual offender, either in the community or in an institutional setting," and, despite promises of anonymity and confidentiality, many of the participants in a self-reporting study may still fear that their admissions will be used against them.¹⁰⁴ Thus, they have every incentive to underestimate their wrongdoing.

2. The Unique Difficulty of Prosecuting Sex Offenses

Sexual assaults and child molestation are crimes that are especially difficult to prosecute successfully. For a variety of reasons, including feelings of humiliation or threats by the perpetrator, many victims do not report the crime.¹⁰⁵ Of those reported, there is often no arrest made; of those arrested, most are never prosecuted and still fewer are convicted.¹⁰⁶ This is due in large part to the dearth of evidence in these

99. See Groth et al., *supra* note 91; Romero & Williams, *supra* note 91.

100. Groth et al., *supra* note 91, at 456.

101. See *id.* at 450.

102. See Furby et al., *supra* note 98, at 4, 27; Groth et al., *supra* note 91, at 456; Romero & Williams, *supra* note 91, at 63-64.

103. See Groth et al., *supra* note 91, at 456; see also DSM III-R, *supra* note 86, at 284 (describing pedophiles as frequently explaining their conduct with "excuses or rationalizations" that their conduct had "educational value" for the child or that the child was provocative).

104. Groth et al., *supra* note 91, at 456.

105. See Karp, *supra* note 21, at 25.

106. See FINKELHOR, *supra* note 98, at 132 ("[T]he vast majority of sexual offenses never are reported, never come to the attention of the authorities, and, even when they do, the probability of conviction is still low."); Furby et al., *supra* note 98, at 9 ("The actual number

cases, making it extremely difficult to satisfy the heavy burden of proof our system places on the prosecution. As one commentator has written:

Child abuse is maddeningly difficult to prove. Maltreatment occurs in secret, with the child usually the only witness. Unfortunately, many victims are too young to testify. While most children three years old and older possess the psychological capacity to testify, a significant number do not take the stand. Of those who do, some are ineffective witnesses. In sex abuse cases, the evidentiary vacuum created by lack of eyewitnesses is often compounded by a paucity of physical evidence because sexual abuse seldom results in physical injury.¹⁰⁷

Obviously, it is true that many, if not most, crimes are at least attempted to be committed in secrecy. But few are so shrouded in secrecy or able to be committed in the defendant's choice of location.¹⁰⁸ Moreover, many of the investigative tools used by the police to obtain evidence in other cases simply are of no use in sex offenses. Undercover agents, wiretaps, search warrants to recover stolen property or contraband, getting a codefendant to roll—none of these can be used to gain evidence in the typical child molestation case. Clearly, prosecutors could use an extra weapon in their arsenal to bring more of these cases to a successful conviction.

III. REVISITING *LANNAN* v. *STATE*¹⁰⁹

The reasoning behind the *Lannan* decision is no longer sound, if indeed it ever was, and it should be abandoned in favor of an adoption of Federal Rules 413 and 414. Some of the concerns raised by the justices have been addressed by the limitations these rules explicitly place on the admission of evidence.¹¹⁰ Others have been alleviated by social science research.¹¹¹ What are left are some unpersuasive reasons that are outweighed by the countervailing arguments in favor of admitting this

of sex offenses is grossly underestimated by official arrest reports. . . . Conviction rates for sex offenses are even lower than arrest rates and dramatically so.”); Groth et al., *supra* note 91, at 458 (“Even if the offense is reported, in the majority of cases, no suspect is apprehended; few of the cases in which a suspect is apprehended reach trial level, and still fewer result in conviction.”); Romero & Williams, *supra* note 91, at 58 (“Sexual assault cases, when reported, are unlikely to be prosecuted and even more unlikely to result in a conviction.”).

107. Myers, *supra* note 25, at 479-80. In fact, Myers states that “[p]hysical evidence of abuse is absent in approximately eighty-five percent of all sexual abuse cases.” *Id.* at 538; see also Robert N. Block, Comment, *Defining Standards for Determining the Admissibility of Evidence of Other Sex Offenses*, 25 UCLA L. REV. 261 (1977).

In many sex crimes, where the only eyewitnesses are the complaining witness and the perpetrator, and where there is a dearth of any independent physical evidence tending to establish the crime's commission, admission of corroborative evidence serves the dual purpose of reducing the probability that the prosecuting witness is lying, while at the same time increasing the probability that the defendant committed the crime.

Id. at 286.

108. See Beale, *supra* note 7, at 317.

109. 600 N.E.2d 1334 (Ind. 1992).

110. See *infra* text accompanying notes 128-33.

111. See, e.g., *infra* text accompanying notes 134-38.

evidence.¹¹² It can no longer be argued that it is the proponents of admission who are acting based on fears and intuitions unsupported by research; rather, it is the opponents who seem to be arguing solely on the basis of another set of intuitions no longer supportable.

The court was willing to accept the conclusion, supported above, that sex offender recidivism rates are quite high, but it pointed to the fact that the recidivism rate for drug offenders is also quite high to say that this alone does not support an exception for sex offense cases.¹¹³ But this simple assertion, really nothing more than an unsupported analogy, is flawed in several respects. The fact that high rates of recidivism have not made propensity evidence admissible against drug offenders does not logically mean, as the court suggests, that it must therefore also be inadmissible as to sex offenders.¹¹⁴ Purely as a matter of logic, it is an equally valid argument that the same high recidivism rates that make prior misconduct relevant and therefore admissible in a sex offense case would also make this same type of evidence relevant in drug offense cases. In other words, this argument does not necessarily cut against admission; maybe it just means that we should be admitting propensity evidence in more cases, not fewer—in drug offense cases as well as in sex offense cases.

Moreover, this analogy ignores the important differences in kind between drug offenses and sex offenses that create a much more urgent need for this evidence in the latter.¹¹⁵ As a general rule, there is much more of an opportunity to gain the evidence necessary for a drug conviction. Physical evidence—the drugs and the money involved in the transaction—can be gathered, undercover agents and wiretaps can be utilized, and often there will be eyewitnesses to the crime. Rarely does such a case boil down to little more than a credibility contest between the defendant and the victim, nor will the defendant be able to argue consent as he often can and does in a rape trial.¹¹⁶ Thus, the fact that we do not abrogate the prohibition on prior misconduct evidence does not, as a general rule, place a tremendous burden on the prosecution. The same can not be said for sex crime prosecutions.

The court's dismissal of what it termed the "bolstering rationale"¹¹⁷ behind the exception was similarly short sighted and inadequately considered. This rationale

112. See *Kyl*, *supra* note 10, at 673 (stating that this is one area of law in which "the philosophical objections to propensity evidence are outweighed by the nature and conditions of the offense").

113. See *Lannan*, 600 N.E.2d at 1336-37; see also *supra* text accompanying notes 90-104.

114. This argument is similar in nature to the argument against the "doctrine of chances" rationale that was discussed earlier. See *supra* text accompanying notes 60-61. In both cases, the argument is that since the same statement could be made about crimes other than sex offenses, there is therefore no justification for treating sex offenses differently.

115. Cf. *Beale*, *supra* note 7, at 317 (providing a reason for treating sex offenses differently from theft, despite the fact that both typically occur in secret without eyewitnesses).

116. See 140 CONG. REC. 23,603 (1994) (statement of Rep. Molinari).

Alleged consent by the victim is rarely an issue in prosecutions for other violent crimes—the accused mugger does not claim that the victim freely handed over his wallet as a gift—but the defendant in a rape case often contends that the victim engaged in consensual sex and then falsely accused him.

Id.

117. *Lannan*, 600 N.E.2d at 1337.

argued that admitting this evidence was necessary to add credibility to the victim's story; without this corroboration, the jury might simply find the accusation too unthinkable and therefore improbable.¹¹⁸ The court's response was that, while this might have been true in a more innocent age, it was unfortunately no longer true in our society.¹¹⁹ Today we are all too aware that child molestation and sexual assaults occur, and we are thus capable of believing the victim even without corroboration. It is correct, of course, that historical requirements of corroboration have, for the most part, been abandoned and that societal awareness of the prevalence of sex offenses is greatly increased.¹²⁰ But no amount of intellectual awareness of the problem makes these crimes any more comprehensible for the average person. Even though we know that there are people who molest children, it is still hard to believe, especially when the defendant at the table does not have two heads but seems to look fairly normal, like the guy next door that you have known for years. In the abstract, such a charge may be more believable today, but that is not necessarily true in any given, concrete case.¹²¹

When this disbelief is added to a paucity of evidence, it can become very hard to convict. Rape cases may boil down to a credibility contest between the victim and a defendant who claims the sex was consensual.¹²² Child molestation cases may have to be made based on a young child's testimony that is not always consistent on dates or details.¹²³ Jurors, confronted by another longstanding principle of our system—that guilt must be proven beyond a reasonable doubt—may feel compelled to acquit in these cases. Without more evidence, it is nearly impossible to say that there is no reasonable doubt as to the defendant's guilt, even if they think that, more likely than not, the victim is telling the truth. Thus, there remains a need, even today, to bolster the credibility or believability of the victim in order to give the jury the assurance that it has correctly assessed the witness's credibility that it needs in order to justify a

118. *See id.* at 1335.

119. *See id.* at 1337.

120. *See Hutton, supra* note 20, at 616; *see also Thompson v. State*, 674 N.E.2d 1307, 1311 (Ind. 1996) (“[A] rape conviction may rest solely upon the uncorroborated testimony of the victim”); *Barger v. State*, 587 N.E.2d 1304, 1308 (Ind. 1992) (“Convictions for child molesting may rest upon the uncorroborated testimony of the victim.”).

121. *See Hutton, supra* note 20, at 616 (“The practical task of convincing a jury to believe uncorroborated testimony, however, remains.”).

122. *See* 140 CONG. REC. 24,799 (1994); 140 CONG. REC. 23,603 (1994) (statement of Rep. Molinari); Karp, *supra* note 21, at 21. Some commentators have discussed the argument that Rule 413 is inconsistent with Rule 412, the rape shield law that protects victims from having their sexual histories revealed. *See Bryden & Park, supra* note 9, at 567-68; Karp, *supra* note 21, at 23. They conclude, however, that the basic concepts and policies behind the laws are not in conflict. Rape shield laws protect the privacy of rape victims and promote their cooperation in the prosecution efforts whereas the defendant can claim no similar privacy interest. *See Karp, supra* note 21, at 23-24. More importantly, there is a crucial distinction in the probative value of the two types of evidence. Evidence of the victim's promiscuity could, arguably, support both the victim's and the defendant's account of the incident whereas evidence of the defendant's prior misconduct can only support the victim's story. *See Bryden & Park, supra* note 9, at 568-71.

123. *See H.R. DOC. NO. 102-58*, at 257 (1991); Myers, *supra* note 25, at 479-80.

conviction.¹²⁴

For neither rationale did the court present a compelling argument in favor of abandonment. The court appeared to recognize this, for the opinion went on to say that both rationales retained some validity.¹²⁵ That validity, however, was outweighed by the prejudice created by the depraved sexual instinct exception as it had been applied.¹²⁶ Rather than rein in the exception by restricting its application to address those concerns, the court chose to abandon the exception entirely. The federal rules, though, provide an excellent example of what such a restricted exception might look like and deal precisely with some of the concerns that the court raised.¹²⁷

The court highlighted three main problems with the exception's application. The first was the lack of any notice requirement.¹²⁸ The prosecution did not have to reveal its intention to use prior misconduct evidence at all, much less provide any of the specifics of that evidence. This problem, however, is easily remedied by simply creating such a requirement.¹²⁹ For example, Rules 413 and 414 require the prosecution to notify the defendant fifteen days in advance in order to be able to use the evidence.¹³⁰

The second concern was that there was no requirement of any degree of similarity between the prior acts and the crime charged.¹³¹ Even if the sexual perversion was of a different nature, it could still be presented as propensity evidence.¹³² Once again, however, it is fairly simple to place some limits on the outside application of the exception. The federal rules do this within the statutes themselves. Only evidence of a past offense of the same kind as the one charged is included within the exception.¹³³ Thus, if a defendant is charged with child molestation, evidence that he previously committed a rape will not be admitted.

The third and final concern raised was that there was no limitation on the amount of time that could have elapsed between the prior misconduct and the current offense.¹³⁴ The depraved sexual instinct exception had been used to admit evidence of acts that occurred as many as ten or even twenty years before the charged crime.¹³⁵

124. See Block, *supra* note 107, at 291 ("The focal issue for the jury in a sex case will almost inevitably comprise a choice between the stories of the victim and of the accused. Relevant evidence of other sex offenses may assist the jury in resolving this critical dilemma.").

125. See Lannan v. State, 600 N.E.2d 1334, 1338 (Ind. 1992).

126. See *id.*

127. See FED. R. EVID. 413-415.

128. See Lannan, 600 N.E.2d at 1338.

129. See Beale, *supra* note 7, at 318 ("The procedural objections are most easily met.").

130. FED. R. EVID. 413(b), 414(b).

131. See Lannan, 600 N.E.2d at 1338.

132. See, e.g., Lawrence v. State, 464 N.E.2d 923 (Ind. 1984) (admitting evidence of a prior rape conviction in a child molestation trial).

133. See FED. R. EVID. 413(a) (authorizing the admission of evidence of another sexual assault offense in a sexual assault trial); FED. R. EVID. 414(a) (authorizing the admission of evidence of another child molestation offense in a child molestation trial).

134. See Lannan, 600 N.E.2d at 1338-39.

135. See, e.g., Lawrence, 464 N.E.2d at 924 (22 years earlier); Crabtree v. State, 547 N.E.2d 286, 289 (Ind. Ct. App. 1989) (20 to 30 years earlier); Dockery v. State, 504 N.E.2d 291, 295-

The court felt that conduct this remote had, at best, only a tenuous connection to the current offense. The authors of Rules 413 and 414 purposely refrained from imposing any time limitations on admissible evidence. "No time limit is imposed on the uncharged offenses for which evidence may be admitted; as a practical matter, evidence of other sex offenses by the defendant is often probative and properly admitted, notwithstanding very substantial lapses of time in relation to the charged offense or offenses."¹³⁶ This decision is supported by the psychological research discussed earlier.¹³⁷ Long-term studies showed the inadequacy of shorter periods of time in accurately measuring recidivism; thus, to arbitrarily pick a cut-off point of five years, for example, would be to lose much valuable and still highly probative evidence.¹³⁸ Moreover, judges still retain discretion under Rule 403 to exclude evidence that would be unduly prejudicial.¹³⁹ Very remote incidents might often fail to pass this balancing test. A rigid time restriction would carry great costs in terms of a loss of flexibility and of valuable evidence without providing any counterbalancing benefits that were not already available.

Closely connected to this is another issue often raised by opponents of Rules 413 and 414, though not addressed specifically in the *Lannan* opinion.¹⁴⁰ Under Indiana's old depraved sexual instinct exception as well as under the new federal rules, evidence does not have to be of a prior conviction or even of a prior charge in order to be admissible. Even allegations of prior misconduct that do not arise until the current charge is made could technically be admitted, creating at least the possibility for false accusations or prosecutorial misconduct. This, however, is not as serious a concern as it might appear at first sight. In the first place, evidence of uncharged acts can already be admitted under Rule 404(b), so this is clearly not per se unduly prejudicial. Regardless of the rule under which it is offered, evidence of uncharged offenses must first clear the hurdle of being proven by a preponderance of the evidence.¹⁴¹ This will screen out the least credible charges. And, of course, the less support there is for this evidence, the less probative value it will have, creating a greater likelihood that it will be excluded under Rule 403.¹⁴²

96 (Ind. Ct. App. 1987) (17 to 30 years earlier).

136. 140 CONG. REC. H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

137. See *supra* Part II.B.1.

138. See Romero & Williams, *supra* note 91, at 61-62 (revealing that their study indicated that sex offenders are "just as, or more, likely to be first arrested for a sex offense in the fourth year following their previous arrest as in the first year"). These researchers concluded from this that "5 years is minimal as an effective followup period when investigating recidivism among sex offenders." *Id.* at 63.

139. See *supra* text accompanying note 55.

140. See Karp, *supra* note 21, at 24-26 (discussing admission of evidence of uncharged offenses as well as prior convictions).

141. See *id.* at 19 (referring to Supreme Court precedent that uncharged offenses may be admitted provided that "a jury could reasonably conclude by a preponderance that the offenses occurred"); see also *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998) (agreeing with Karp's analysis that other offenses must be shown by a preponderance of the evidence).

142. See *Enjady*, 134 F.3d at 1433 (listing how clearly the prior act has been proved as one of the factors to consider in applying the Rule 403 balancing test); see also Karp, *supra* note 21, at 26 ("If there are weaknesses in the government's evidence supporting the uncharged

More importantly, however, to limit the exception to evidence of prior convictions would be to undercut the whole premise and purpose of the exception. The exception is based largely on the incredible difficulty of obtaining convictions for these crimes and the resulting desire to avoid handicapping the state unnecessarily in the prosecution of these cases.¹⁴³ The whole point is that these offenses rarely result in convictions, especially when tried individually, apart from any knowledge of other similar acts.¹⁴⁴ The exception, then, would be rather worthless if it could be utilized against only those who were previously convicted. It works because, when viewed together and in their totality, multiple allegations lend sufficient credibility to the victims, while at the same time decreasing the chance that the defendant has been falsely accused, to allow the jury to convict in good conscience.¹⁴⁵ The key is the totality of the evidence. Just as, within any given case, any one piece of evidence is not sufficient to convict but the sum total may be, so also one charge, standing alone, may not be sufficient to convict but an additional two or more allegations added to it may be. In order to reap the full benefits of the exception, its scope must be wide enough to include evidence falling short of actual convictions.

Finally, the *Lannan* court strove to reassure people that the abandonment of the depraved sexual instinct exception does not mean that prior sexual misconduct evidence will never be admitted.¹⁴⁶ Such evidence will still be admitted when it falls under one of the exceptions to Rule 404(b), and the opinion leaves the impression that this will not be an infrequent occurrence.¹⁴⁷ In actual fact, this is not the societal safety net the court would have us believe. If, on one hand, the 404(b) exceptions are applied according to their actual meaning, prior sexual misconduct evidence will not fall under them with great frequency.¹⁴⁸ If, on the other hand, the 404(b) exceptions are applied loosely and stretched in order to massage this evidence under them, then there is no real point in abandoning the depraved sexual instinct exception. At the cost of intellectual honesty, we will have gained nothing except, perhaps, consistent adherence to a principle. That means little, however, when our adherence is in name only and the principle is ignored in actual fact.

Moreover, as it turns out, the court has made it clear in subsequent cases that it intends to apply Rule 404(b) according to its literal meaning, rather than stretching

offenses, then the jury will be less persuaded of their occurrence, and their probative value as evidence of the charged offense is reduced accordingly.”).

143. See *Lannan v. State*, 600 N.E.2d 1334, 1337-38 (Ind. 1992); see also Beale, *supra* note 7, at 316-17; Segal, *supra* note 12, at 536.

144. See Groth et al., *supra* note 91, at 458; Romero & Williams, *supra* note 91, at 58; see also Karp, *supra* note 21, at 25 (noting that many victims are more willing to endure the pain of testifying when they discover that this person has now victimized others).

145. See Karp, *supra* note 21, at 25-26.

146. *Lannan*, 600 N.E.2d at 1339.

147. In fact, the court devotes almost two pages (about a quarter of the opinion) to explaining how and under what circumstances this evidence will still be admitted. See *id.* at 1339-40.

148. This explains why many states that have adopted Rule 404(b) have nevertheless retained their common law lustful disposition rules. See Reed, *supra* note 4, at 200. As a policy matter, they believe this evidence should be admissible against these offenses, but they recognize that this will be difficult to do if they rely only on Rule 404(b).

those exceptions to admit this type of evidence.¹⁴⁹ For example, the court has construed the intent exception very narrowly, making it available only when the defendant “affirmatively presents a claim of a particular contrary intent.”¹⁵⁰ In short, then, it appears evident that prior sexual misconduct evidence will rarely be admissible in Indiana.

In light of all this, Indiana should adopt Federal Rules of Evidence 413 and 414. These rules are more restrictive than the old depraved sexual instinct exception, thereby alleviating the risk of undue prejudice to defendants. At the same time, they permit the admission of evidence that has been shown to be highly probative. They strike an appropriate balance between admitting reliable evidence and minimizing the risk that the defendant will be convicted for who he is, rather than for what he has done. In the alternative, the court could adopt an even more limited version of Rules 413 and 414. For example, the court could require that the prior misconduct evidence be preceded by expert testimony that—based on the acts committed, the victims chosen, and the circumstances surrounding the conduct—this particular defendant is deviant and likely to be recidivistic.¹⁵¹ This requirement would serve as yet another assurance that this evidence was highly probative and would provide the jury with a context in which to understand the proper relevance of the evidence.

149. *See Sundling v. State*, 679 N.E.2d 988, 993 (Ind. Ct. App. 1997) (“The exceptions in Evid. R. 404(b) are only available when a defendant goes beyond merely denying the charged crimes and affirmatively presents a specific claim contrary to the charge.”). Where the defendant’s claim is that the molestation never occurred, none of the exceptions in Rule 404(b) are genuinely in dispute and cannot, therefore, be used to get the evidence into the trial. *See id.*

150. *Wickizer v. State*, 626 N.E.2d 795, 799 (Ind. 1993). In this opinion, the court held that “Indiana is best served by a narrow construction of the intent exception in Evid. R. 404(b).” *Id.* Moreover, the court held that the defendant must make his claim of contrary intent before the prosecution presents any evidence of prior misconduct. *See id.* at 800. Thus, in this case, because this evidence was introduced in the prosecutor’s case in chief, the court reversed the defendant’s conviction *despite the fact* that he did make an affirmative claim of a different intent, saying that his touchings were not motivated by sexual desires but by a desire to help the victims. *See id.* at 799. The final blow was that the court ruled that this was not harmless error, despite the fact that this evidence could have been admitted in rebuttal, because it had received too much emphasis. *See id.* at 801; *see also Fisher v. State*, 641 N.E.2d 105, 108-09 (Ind. Ct. App. 1994) (overturning a conviction despite the fact that the defendant claimed an innocent intent and the prior misconduct evidence was not introduced until rebuttal because the prior misconduct was not “similar enough and close enough in time to be genuinely relevant”).

151. Arizona has created a similar requirement for its common law lustful disposition rule. When evidence is introduced to show a propensity, a medical expert must first lay a foundation for this evidence; no such expert testimony is required if the evidence is being admitted to show something other than a propensity. *See Reed, supra* note 4, at 194-96. Another example of the type of limitation the court could impose would be to adopt only Rule 414, thus restricting the use of prior misconduct evidence to cases of child molestation and incest. Despite its adoption of Rule 404(b), Arkansas has continued to admit prior misconduct evidence under a lustful disposition exception for these two types of cases on the grounds that it is relevant to show a proclivity toward a particular person or class of persons. *See id.* at 193.

CONCLUSION

Sex offenses are particularly vicious crimes that inflict a profound and long-lasting harm. But they are also particularly difficult to prosecute, and the attempt to do so can create yet more trauma for the victim. The Federal Rules of Evidence have recognized this and given prosecutors an additional tool—the ability to introduce evidence that the defendant has committed other similar offenses. Indiana should do likewise. The reasons that led the Indiana Supreme Court to abolish the common law depraved sexual instinct exception fail to provide a convincing rationale for this action. More importantly, they do not provide a rationale for failing to adopt Federal Rules 413 and 414, rules that limit admission to only the most probative prior misconduct evidence.

In the special context of sex offense cases, evidence that is relevant and highly probative should not be *per se* excluded through adherence to a principle against character evidence. It is no longer clear that this principle is psychologically valid, especially in the context of highly recidivistic deviant sexual conduct, but that is not the most troubling aspect of this obstinate adherence. It is one thing to stick stubbornly to principle, no matter its dubious scientific merit, when the cost of doing so is rather low. It is another to do so at the expense of children, the most vulnerable in our society, and women, all in order to protect defendants who have already shown themselves to be capable of heinous acts and who are statistically likely to do so again. The costs to victimized women and children in Indiana, in terms of overturned convictions and prosecutions never attempted, are too high.